

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of

Request for Review by

CONNECT2 INTERNET NETWORK, INC.

of Decisions of Universal Service  
Administrator

)

)

)

)

)

CC Docket No. 02-<sup>6</sup>~~86~~

471 Application No. 191068, Funding  
Request No. 405672

471 Application No. 181141, Funding  
Request No. 369754

471 Application No. 180301, Funding  
Request Nos. 402791, 402812

471 Application No. 180447, Funding  
Request No. 403952

471 Application No. 192159, Funding  
Request No. 409816

471 Application No. 180273, Funding  
Request No. 405254

471 Application No. 148299, Funding  
Request No. 283910

471 Application No. 188159, Funding  
Request No. 394744

471 Application No. 191121, Funding  
Request Nos. 406185 and 406201,

471 Application No. 180210, Funding  
Request No. 366094

471 Application No. 180370, Funding  
Request No. 417811

**RECEIVED**

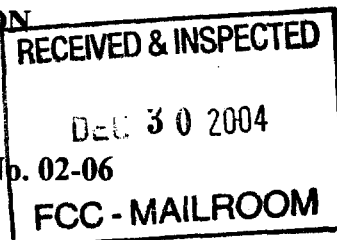
DEC 27 2004

Federal Communications Commission  
Office of Secretary

**CONSOLIDATED REQUEST FOR REVIEW AND PETITION FOR WAIVER**

Timothy J. Fitzgibbon, Esquire  
Jennifer M. Wagman, Esquire  
Carter Ledyard & Milburn LLP  
1401 Eye Street, N.W. #300  
Washington, D.C. 20005  
(202) 898-1515  
*Counsel for Connect2  
Internet Networks, Inc.*

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554



In the Matter of )

Request for Review by )

CONNECT2 INTERNET NETWORK, INC. )

of Decisions of Universal Service  
Administrator

CC Docket No. 02-06

471 Application No. 191068, Funding  
Request No. 405672

471 Application No. 181141, Funding  
Request No. 369754

471 Application No. 180301, Funding  
~~Request Nos. 402791, 402812~~

~~471 Application No. 180447, Funding  
Request No. 403952~~

471 Application No. 192159, Funding  
Request No. 409816

471 Application No. 180273, Funding  
Request No. 405254

471 Application No. 148299, Funding  
Request No. 283910

471 Application No. 188159, Funding  
Request No. 394744

471 Application No. 191121, Funding  
Request Nos. 406185 and 406201,

471 Application No. 180210, Funding  
Request No. 366094

471 Application No. 180370, Funding  
Request No. 417811

**CONSOLIDATED REQUEST FOR REVIEW AND PETITION FOR WAIVER**

Timothy J. Fitzgibbon, Esquire  
Jennifer M. Wagman, Esquire  
Carter Ledyard & Milburn LLP  
1401 Eye Street, N.W. #300  
Washington, D.C. 20005  
(202) 898-1515  
*Counsel for Connect2  
Internet Networks, Inc.*

## TABLE OF CONTENTS

TABLE OF CONTENTS .....	i
SUMMARY .....	ii
CONSOLIDATED REQUEST FOR REVIEW AND PETITION FOR WAIVER .....	1
Background .....	2
Argument .....	8
I. Connect2's Appeal To USAC Was Not Untimely. ....	8
A. Correspondence Sent To Mr. Angelides After His Debarment Can Not Be Relied Upon To Provide Notice To Connect2 .....	8
B. Connect2 Was Not "Aggrieved" Until The RODLs Were Issued.....	9
C. <b>Good Cause Exists For Waiver Of the 60 Day Filing Period</b> .....	10
II. <b>Connect2's Involvement In The E-Rate Program Already Was The Subject Of A</b> Prosecution By DOJ And A Plea Agreement. ....	12
III. Connect2 Has Been Denied Due Process With Respect To The SLD Claims .....	13
IV. The Amounts Involved In Certain USAC Demands Are De Minimis In Any Event. ....	16
V. Demanding Full Recovery From Connect2 Is Arbitrary and Capricious. ....	17
A. The Schools Have Received The Benefits Of The Disbursed Funds. ....	17
B. Demanding Recovery Exclusively From Connect2 Is Inequitable.....	18
C. USAC's Recovery Demands Are Excessive and Ultimately Inconsistent With The Objectives of Statute.....	18
Conclusion .....	20

## SUMMARY

The Commission should grant review of the captioned decisions by the Universal Service Administrative Company ("USAC") dismissing as untimely Connect2 Internet Network Inc.'s ("Connect2") appeals of the Repayment/Offset Demand Letters ("RODLs") and associated Commitment Adjustment Letters ("CALs") issued by the Schools and Libraries Division ("SLD") of USAC with respect to the Funding Requests and schools listed in Exhibit 1 hereto. Contrary to USAC's determination, the appeals were timely filed within 60 days of the decisions **by which Connect2 was aggrieved. The CALs upon which USAC bases its finding of** untimeliness were sent by USAC to Mr. John Angelides months after he was debarred by the Commission from all activities relating to the School and Libraries Support Program, at a time when he was undergoing extensive cancer treatment, and cannot be relied upon by USAC to provide reasonable notice to Connect2 of matters relating to that Program. In any event, Connect2 was not aggrieved by the SLD's actions until SLD sent the RODLs, informing Connect2 that SLD intended to recover funds from Connect2.

In any event, the Commission should grant a waiver of any applicable filing deadline in order to consider the merits of Connect2's appeal. Connect2's participation in the E-Rate Program at numerous schools in New York and New Jersey (including the schools at issue here) already has been the subject of a criminal prosecution by the United States Department of Justice ("DOJ"). That prosecution, in which USAC and the Commission's Office of Inspector General ("OIG") participated, resulted in a plea agreement that provides, among other things, for a civil forfeiture of \$290,000, an amount which DOJ determined to represent "the amount of proceeds obtained as a result of the offense." Having determined that the claims against Connect2 involved an "indication of fraud, the presentation of a false claim, or a

misrepresentation,” the Commission was required to, and did, turn these matters over to DOJ for prosecution and cannot now revisit those claims in the form of the recovery actions based on rules and procedures adopted in the intervening years.

Connect2 and Mr. Angelides already have paid a huge price for their misconduct in the Schools and Libraries program. Connect2 is essentially out of business and Mr. Angelides, a 67 year old man who previously had no problems with the law and was well respected in his community, has pleaded guilty to felony charges, agreed to a substantial forfeiture, been debarrred from the Schools and Libraries Program, and been diagnosed with terminal cancer. ~~USAC’s current recovery efforts are excessive and inequitable in that they seek~~ recovery from Connect2 of nearly \$1,700,000 in funds used to provide equipment and services to the listed schools, based exclusively on the schools’ failure to pay the non-discounted portion of the costs of the equipment and services. Moreover, USAC’s actions are based on alleged violations of rules that did not exist and procedures for the recovery of funds that were not authorized either at the time that Angelides entered the plea agreement in the criminal proceedings or at the time that the CALs and RODLs were issued.

For the foregoing reasons, the Commission should grant review of the USAC decisions, consider the merits of Connect2’s appeal, and exercise its discretion to terminate collection efforts with respect to these claims. At a minimum, due process requires that Connect2 be afforded an opportunity for hearing with respect to the recovery demands at issue here.

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

In the Matter of	)	
	)	
Request for Review by	)	
	)	CC Docket No. 02-06
CONNECT2 INTERNET NETWORK, INC.	)	
	)	471 Application No. 191068
of Decisions of Universal Service	)	Funding Request No. 405672
Administrator	)	
	)	471 Application No. 181141
	)	Funding Request No. 369754
	)	<b>471 Application No. 180301</b>
	)	<b><del>Funding Request No. 402791</del></b>
	)	<b>Funding Request No. 402812</b>
	)	471 Application No. 180447
	)	Funding Request No. 403952
	)	471 Application No. 192159
	)	Funding Request No. 409816
	)	471 Application No. 180273
	)	Funding Request No. 405254
	)	471 Application No. 148299
	)	Funding Request No. 283910
	)	471 Application No. 188159
	)	Funding Request No. 394744
	)	471 Application No. 191121
	)	Funding Request No. 406185
	)	Funding Request No. 406201
	)	471 Application No. 180210
	)	Funding Request No. 366094
	)	471 Application No. 180370
	)	Funding Request No. 417811

## **CONSOLIDATED REQUEST FOR REVIEW AND PETITION FOR WAIVER**

Connect2 Internet Networks, Inc. ("Connect2"), by counsel and pursuant to Sections 54.719 through 54.721 of the Commission's Rules, hereby requests review of the above-captioned decisions by the Universal Service Administrative Company, dated October 26, 2004 ("USAC Decisions"), dismissing without consideration Connect2's appeals of the Repayment/Offset Demand Letters ("RODLs") and associated Commitment Adjustment Letters ("CALs") issued by the Schools and Libraries Division ("SLD") of USAC with respect to the **Funding Requests and schools listed in Exhibit 1 hereto. Pursuant to Section 1.3 of the** Commission's Rules, Connect2 also hereby petitions for waiver of the 60-day period within which to appeal the CALs, to the extent that such waiver is required in order for USAC or the Commission to consider the substantive merits of Connect2's appeals.

The Commission should grant review, reverse the USAC Decisions and consider the substantive merits of Connect2's appeal because the appeal was not untimely and because:

- (a) Connect2's involvement in the E-Rate Program at these and numerous other schools in New York and New Jersey already has been the subject of a criminal prosecution by the United States Department of Justice ("DOJ") -- with the knowledge, participation and cooperation of USAC and the Commission's Office of Inspector General ("OIG") -- in which a compromise on these and other claims was reached in the form of a plea agreement and civil forfeiture over 18 months ago;
- (b) the determination to treat these matters as fraudulent claims by Connect2 required the claims to be transferred to the DOJ, effectively depriving the Commission of jurisdiction over them;
- (c) Connect2 has been denied due process with respect to the SLD claims;
- (d) the amounts involved at certain of the schools are de minimis in any event and collection will require expenditure of amounts far exceeding the amounts at issue and;
- (e) the SLD's effort to recover

substantial sums from Connect2 based solely on the school's failure to pay its non-discounted portion of the costs of the equipment and services installed by Connect2 at the schools is arbitrary and capricious. The Commission should exercise its discretion to cease collection activities against Connect2 with respect to these demands. In the event that the Commission decides to pursue the recovery demands at issue here, Connect2 respectfully requests the opportunity for hearing.

### Background

By letters dated April 1, 2004, SLD sought to inform Connect2 that SLD had discovered "certain applications where funds were committed in violation of program rules" of the Schools and Libraries Universal Service Program with respect to equipment and services installed by Connect2 at the listed schools and that "SLD must now adjust these funding commitments." See CALs at 1.<sup>1</sup> In each case, the CAL was addressed to "Mr. John Angelides, Connect2 Internet Networks, Inc., 26 Bay Street, Staten Island, New York." Despite Mr. Angelides debarment four months earlier,<sup>2</sup> the CALs addressed to him stated that SLD was "also sending this information to applicant, so that you may work with them to implement this decision." *Id.*

The CALs also stated that if the funds already disbursed exceeded the "adjusted Funding Commitment amount," USAC would "have to recover some or all of the funds disbursed" and that "we expect to send you a letter describing the process for recovering these funds in the near future." *Id.* Each of the CALs said that a copy of the letter regarding recovery

---

<sup>1</sup> Copies of the relevant CALs are annexed as Exhibit 2.

<sup>2</sup> On December 23, 2003, Mr. Angelides had been debarred by the Commission and was expressly prohibited from engaging in any activities "associated with or related to the schools and libraries support mechanism, including the receipt of funds or discounted services through the schools and libraries support mechanism, or consulting with, assisting or advising applicants or service providers regarding the schools and libraries support mechanism." See Notice of Debarment, DA 03-4088, 18 FCC Rcd 26722 (December 23, 2003) ("Angelides Debarment Notice").



of the funds also would be sent to the school. *Id.* On June 16, 2004, SLD sent a RODL regarding each of the funding requests and schools listed in Exhibit 1 to Mr. Angelides at the Staten Island address for Connect2. Copies of the RODLs are attached as Exhibit 3. A second RODL regarding most of the funding requests and schools was sent on July 22, 2004.<sup>3</sup> The CALs and RODLs together seek recovery of nearly \$1,700,000 in funds alleged to have been disbursed erroneously to Connect2 in Funding Years 1999 or 2000 -- based exclusively on the schools' failure to pay all or part of the non-discounted portion of the cost of equipment and **services installed by Connect2 at the schools.**

**When it sent the CALs and RODLs to Mr. Angelides at the address set forth** above, SLD and USAC knew or should have known that: (a) Mr. Angelides had been debarred in 2003 from all activities relating to the schools and libraries program; and (b) Connect2's involvement in the schools and libraries program at schools in New York and New Jersey already had been the subject of a criminal prosecution by DOJ (in which USAC and OIG had cooperated), resulting in a plea agreement with Mr. Angelides which included a civil forfeiture of \$290,000, representing "the approximate amount of the proceeds obtained as a result of the offense." On or about December 17, 2002, Mr. Angelides was arrested by agents of the FBI pursuant to an eight-count criminal complaint which alleged, among other things, that: (a) Mr. Angelides, acting on behalf of Connect2, had engaged in a scheme to defraud the E-Rate Program by failing to require schools to pay the non-discounted portion of the cost of equipment and services provided by Connect2; and (b) "the Government actually paid C2I more than \$9 million in E-rate monies for goods and services that C2I provided to approximately 36 schools" in the New York/New Jersey area, the majority of which "purported to participate [in the E-Rate

---

<sup>3</sup> Connect2 has no record of receiving a second RODL with respect to Funding Request No. 405672 at Cathedral School or Funding Request Nos. 406185 and 406201 at the School of the Transfiguration.

is annexed as Exhibit 5. The fraud alleged in the Information consisted of failing to require the schools to pay the non-discounted portion of the cost of goods and services provided by Connect2 and subsequently attempting to cover up that failure. The Forfeiture Allegation of the Information stated that Mr. Angelides was to forfeit to the United States pursuant to Title 18, United States Code, Section 981(a)(1)(c) and other provisions "a sum of money equal to approximately \$290,000...representing the amount of proceeds obtained as a result of the offense." Information at 10-11.

**The guilty plea was entered pursuant to a written plea agreement with the United States Department of Justice, acting through the United States Attorney for the Southern District** of New York, which stated among other things that "neither the defendant nor Connect2 Internet Networks, Inc. will be further prosecuted criminally by this Office...for participating, from in or about the Fall of 1999 through in or about October 2002, in a scheme to defraud the Federal Government's E-Rate school and library funding program through the submission of false, fraudulent and misleading claims and statements, as charged in the Information." A copy of the written plea agreement is annexed as Exhibit 6. When the plea agreement was entered into, there were no outstanding demands against Connect2 or Mr. Angelides for further payment or recovery from USAC or the Commission.

Weeks after he pleaded guilty, Mr. Angelides was diagnosed with Stage IV metastasized non-small cell lung cancer, which has spread to his brain. He is terminally ill and continues to receive treatment at the Memorial Sloan-Kettering Cancer Center. Judge Griesa, who presided over the criminal proceedings, has postponed sentencing based on Mr. Angelides medical condition, with the acquiescence of the U.S. Attorney's Office. Copies of medical

reports and status reports to the court attesting to Mr. Angelides condition and the postponement of his sentencing are annexed as Exhibit 7.

On December 23, 2003, Mr. Angelides was debarred from the schools and libraries universal service support mechanism, and all activities “associated with or related to” that program, for a period of three years. See Angelides Debarment Notice, 18 FCC Rcd. at 26722. The basis for the debarment was the guilty plea entered by Mr. Angelides in the criminal proceedings described above. See Notice of Suspension and Proposed Debarment, DA-03-2707, 18 FCC Rcd. 16672 (August 21, 2003). *Mr. Angelides did not contest his debarment.*

~~On the same day, the Commission released a Further Notice of Proposed~~ Rulemaking (“FNOPR”) seeking public comment on “the question of what recovery procedures would be appropriate in situations where it is determined that funds have been disbursed in violation of particular programmatic rules that do not implicate statutory requirements.” See Schools and Libraries Universal Service Support Mechanism, Third Report and Order and Second Further Notice of Proposed Rulemaking, 18 FCC Rcd. 26912 (Dec. 23, 2003) at ¶79.<sup>6</sup> Pursuant to that FNOPR, the Commission in August 2004 revised and extended its oversight of, and supplemented the recovery procedures applicable to, the Schools and Libraries Program. Among other things, the Commission concluded for the first time that the recovery procedures applicable to disbursements made in violation of the Telecommunications Act also should be applied by USAC to disbursements in violation of Commission rules and that “all funds disbursed should be recovered for any funding requests in which the beneficiary failed to pay its non-discounted share.” See Schools and Libraries Universal Service Support Mechanism, Fifth

---

<sup>6</sup> The Commission previously had adopted a plan for recovery of funds distributed in violation of the Telecommunications Act of 1996, specifically where funding had been committed for “ineligible services” or for “services provided by non-telecommunications carriers” in violation of Section 254 of the Communications Act. Id. at ¶79, n. 164.

Report and Order, FCC 04-190, 19 FCC Rcd. 15808 (2004) ("Schools and Libraries Fifth R&O") at ¶¶13, 15, 24.

Notwithstanding Mr. Angelides' guilty plea, the civil forfeiture amount agreed to by DOJ, and his subsequent debarment, SLD began sending CALs and RODLs addressed to Mr. Angelides for Connect2 in 2004 concerning the same E-Rate Program activities that were encompassed within the criminal prosecution and plea agreement. The CALs and RODLs at issue here are among more than 25 CALs and other demand letters apparently sent to Mr. Angelides and Connect2, seeking total recoveries of nearly \$5,000,000. **By letter dated July 20, 2004, Connect2 appealed the SLD's decisions demanding substantial repayments from Connect2** based on reduced funding commitments resulting from the schools' failure to pay their non-discounted share. Among other things, Connect2's appeal letter to USAC explained that these matters already had been the subject of a criminal prosecution and that Mr. Angelides -- to whom all of the SLD correspondence had been addressed -- was undergoing extensive medical treatment for "Stage-IV metastasized non-small cell lung cancer, which has spread to the brain," and as a result did not bring certain letters to the attention of counsel promptly. A copy of Connect2's July 20, 2004 appeal letter is attached as Exhibit 8. However, Connect2's appeal was summarily dismissed by USAC because it was not filed within 60 days of the date of the CALs at issue here. Connect2 respectfully requests the Commission to review the USAC Decisions dismissing the appeals as untimely, to grant a waiver of the 60-day rule if necessary, and to consider the merits of its appeal with respect to the CALs and RODLs set forth in Exhibit

1.

## Argument

### I. Connect2's Appeal To USAC Was Not Untimely.

Each of the USAC Decisions dated October 26, 2004 which are the subject of this Request and Petition dismissed Connect2's appeal without consideration for the same reason:

Our records show that your appeal was postmarked more than 60 days after the date your Commitment Adjustment Letter was issued, as shown above. Federal Communications Commission (FCC) rules require applicants to postmark appeals within 60 days of the date on the decision letter being appealed. FCC rules do not permit the SLD to consider your appeal.

~~See, e.g.~~ **USAC Decision Letter dated October 26, 2004 regarding Cathedral School, Application No. 191068, Funding Year 2000-2001, at 1. In short, USAC summarily dismissed Connect2's** appeal because it was not filed within 60 days of the date of the CALs. The Commission should review and reverse the USAC Decisions because: (a) notices sent by SLD to Mr. Angelides months after he was debarred from all activities relating to the schools and libraries program cannot be relied upon to provide timely notice of SLD's claims against Connect2 concerning that program; (b) the USAC decisions applied the wrong standard in finding the appeal untimely; (c) a waiver of the 60-day rule is warranted under the circumstances presented here; and (d) the substantive merits of Connect2's appeals warrant consideration by the Commission in any event.

#### A. Correspondence Sent To Mr. Angelides After His Debarment Can Not Be Relied Upon To Provide Notice To Connect2

Mr. Angelides was debarred by the Commission in December 2003 from all "activities associated with related to the schools and libraries support mechanism," including "consulting with, assisting or advising applicants or service providers regarding the schools and libraries support mechanism." Angelides Debarment Notice, 18 FCC Rcd. at 26722. That debarment did not apply to Connect2. Id. at 26722. Nevertheless, in April 2004 -- four months after his debarment -- SLD chose to attempt to notify Connect2 of the CALs by sending them to

Mr. Angelides (see Exhibit 2). USAC then relied exclusively upon the efficacy of that notice in dismissing Connect2's appeal for failure to file within 60 days of the date of the CALs. Having debarred Mr. Angelides from all activities relating to the Schools and Libraries Program, SLD and USAC cannot now rely upon correspondence sent to him months after his debarment as sufficient to provide notice to Connect2 of matters relating to that Program.

B. Connect2 Was Not "Aggrieved" Until The RODLs Were Issued.

Section 54.719(a) of the Commission's Rules states that any "person aggrieved by **an action taken by a division of the administrator**" may seek review of that decision at USAC. **Section 54.720 provides that the requests must be filed within sixty days of the issuance of the** decision by which the person was aggrieved. Although USAC dismissed Connect2's appeal because it was not filed within 60 days of the CAL, Connect2 was not aggrieved until SLD sought recovery of funds from Connect2 in the RODLs.

The stated purpose of the CAL was to notify Connect2 that SLD had found "certain applications where funds were committed in violation of program rules" and "to inform you of the adjustments to these funding commitments required by program rules." See, e.g. CAL dated April 1, 2004 regarding Cathedral School, at 1. The letter further stated that "SLD is also sending this information to applicant [school], so that you may work with them to implement this decision." Id. Finally, although the CAL stated that SLD "will have to recover some or all of the funds disbursed," it specifically stated that SLD "expect[s] to send you a letter describing the process for recovering these funds in the near future," and that a similar letter would be sent to the school as well. Id.

SLD did not send a letter demanding repayment by Connect2 of any of the sums specified in the CAL until June 16, 2004. At that point, Connect2 became "a person aggrieved"

by an action taken by a division of the Administrator because it was then clear that SLD and USAC were demanding substantial further payments from Connect2 -- despite the criminal prosecution and plea agreement, the imposition of a civil forfeiture, the debarment of Mr. Angelides, and the fact that the sole basis for the CAL and RODL was the school's failure to pay its share of the costs. Accordingly, Connect2 filed a timely appeal to USAC as a party aggrieved by the actions of SLD within 60 days of the RODL.

C. Good Cause Exists For Waiver Of the 60 Day Filing Period

**Even if USAC correctly determined that the time for filing Connect2's appeal began to run from the date of the CAL rather than the date of the first RODL, good cause exists for waiver of the 60 day rule and substantive consideration of the merits of Connect2's appeal.** The CALs attempting to notify Connect2 of SLD's actions were sent to Mr. Angelides months after he was debarred, at a time when USAC knew or should have known that Mr. Angelides was undergoing extensive medical treatments for lung cancer which had spread to his brain. Both USAC and the Commission actively cooperated with DOJ in the prosecution of Mr. Angelides and should have been aware of his medical condition -- which has led the presiding federal Judge to postpone sentencing of Mr. Angelides with the consent of the U.S. Attorney office that prosecuted him. See Exhibit 7. Connect2's July 20, 2004 appeal letter from counsel specifically informed USAC that Mr. Angelides "did not immediately bring the letters [from SLD] to our attention" due to his terminal illness and that Connect2 apparently had not received CALs or other explanations of the basis for the recovery demands at certain schools. Connect2 should not be penalized because USAC elected to send the CALs to Mr. Angelides after his debarment while he was undergoing cancer treatment.

The public interest also warrants a waiver of the procedural deadline (if necessary) and substantive consideration of the issues raised in Connect2's appeal. The Commission has stated that "if there are unique reasons why a particular entity believes recovery for a rule violation is inappropriate, that party is *always free* to present such information *in seeking review of USAC's decision to recover monies*, pursuant to section 54.722" of the rules. See School and Libraries Fifth R&O at 29 (emphasis added).<sup>7</sup> See also, Federal- State Joint Board On Universal Service, Order on Reconsideration and Fourth Report and Order, CC Docket Nos. 96-45, 97-21 and 02-6, FCC 04-181 (July 2004) ("Schools and Libraries Fourth R&O") at ¶10, n.30 ("~~my service provider is free to challenge a recovery action directed to it if the time~~ frame for seeking an appeal from USAC or the Commission has not yet run.") (emphasis added). As set forth herein, there are unique and substantial reasons why USAC's efforts to collect millions of dollars from Connect2's are inappropriate under the circumstances presented here. USAC's collection efforts present "novel questions of fact, law and policy," not just with respect to Connect2 and Angelides, but also with respect to their ultimate impact upon the schools and the overall goals and objectives of the Schools and Libraries program.<sup>8</sup> The Commission should not rely on USAC's erroneous interpretation of the filing requirements in sections 54.719 and 54.720 to avoid consideration of these issues on the merits, particularly where USAC's calculation of the applicable deadline is based on the questionable premise that correspondence sent to Mr. Angelides after his debarment constituted effective notice to Connect2. Connect2

<sup>7</sup> Among other things, Section 54.722 states that "requests for review that raise novel questions of fact, law or policy" shall be considered by the full Commission.

<sup>8</sup> As the Court of Appeals noted more than 30 years ago, "sound administrative procedure" requires an agency "to take into account considerations of hardship, equity or more effective implementation of overall policy" in evaluating requests for waiver of its rules. The "combination of a general rule and limitations is the very stuff of the rule of law, and with diligent effort and attention to essentials administrative agencies may maintain the fundamentals of principled regulation without sacrifice of administrative flexibility and feasibility." WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).



respectfully requests a waiver of the filing periods set forth in Section 54.720, to the extent that such waiver is required to allow substantive consideration of the merits of its appeal.

II. Connect2's Involvement In The E-Rate Program Already Was The Subject Of A Prosecution By DOJ And A Plea Agreement.

The CALs, RODLs and the USAC Decisions are part of an administrative process developed by USAC and the Commission to identify and recover, pursuant to the Federal Debt Collection Improvement Act, funds disbursed in violation of Section 254 of the Communications Act. See Schools and Libraries Fifth R&O at ¶15. However, the Commission's rules expressly **state that claims "in regard to which there is an indication of fraud, the presentation of a false claim, or a misrepresentation on the part of the debtor...shall be referred to the Department of Justice ("DOJ") as only the DOJ has authority to compromise, suspend or terminate collection action on such claims."** See 47 C.F.R. §1.1902(c) (emphasis added). In this case, DOJ already has investigated and prosecuted claims of fraud against Mr. Angelides which included the very activities that are the subject of the CALs and RODLs. See, e.g., Complaint at 7, 16-18, 28-30, 33. In fact, in December 2002 the FBI seized Connect2's records regarding all of these schools in furtherance of that prosecution and at least one of the schools at issue here was expressly referenced in the Complaint. Id.

DOJ agreed to compromise those claims in May 2003 in return for a guilty plea from Mr. Angelides and an agreement to pay a civil forfeiture in the amount of \$290,000, "representing the approximate amount of the proceeds obtained as a result of the offense charged in Count One of the Information." See Information, Exhibit 4, at 11; Plea Agreement, Exhibit 5, at 1. Both USAC and OIG assisted and cooperated in that prosecution, providing DOJ with access to documents, materials, audit services and other information regarding Connect2. See Complaint at 16, 18; 2003 OIG Report at 7. In return for the guilty plea and the agreement to

pay \$290,000, DOJ agreed that it would not further prosecute Angelides or Connect2 “for participating, from in or about the Fall 1999 through in or about October 2002, in a scheme to defraud the Federal Government’s E-Rate school and library funding program through the submission of false, fraudulent and misleading claims and statements....” Plea Agreement at 2. Given the mandatory referral language of §1.1902(c) of the Commission’s Rules, the direct involvement of USAC and OIG with DOJ in bringing the complaint, and the compromise already effected by DOJ in the plea agreement and civil forfeiture, USAC and the Commission **cannot now revisit the terms of the compromise with DOJ by seeking recovery of additional funds from Connect2.**

III. Connect2 Has Been Denied Due Process With Respect To The SLD Claims

SLD’s recovery demands against Connect2 are based exclusively on claims that the schools failed to pay all or part of the non-discounted portion of the cost of equipment and services installed by Connect2 at the schools and that such failure constituted a violation of Commission rules. The criminal prosecution, in which USAC and the OIG participated, included substantially the same claims.<sup>9</sup> When Mr. Angelides accepted the plea agreement and civil forfeiture, there were no outstanding demands by USAC or the Commission for further payment by Connect2 or Mr. Angelides. Now, by employing rules adopted by the Commission months or years after the plea agreement and months after the CALS and RODLs were issued, USAC seeks to recover additional funds based on the same conduct and activities that were the subject of the criminal prosecution and plea agreement.

---

<sup>9</sup> In fact, in December 2002, prior to his arrest, Mr. Angelides and his then attorneys met with USAC and provided information and materials to USAC which reported, among other things, that nearly all of the schools at issue here had not paid the non-discounted portion of the cost of equipment and services installed by Connect2 at those schools. Connect2 will endeavor to obtain and provide copies of these materials to the Commission in the event that USAC has not provided them to the Commission.

The Commission had authorized USAC in 1999 to seek recovery of funds disbursed in violation of the statute, specifically where funds had been disbursed for ineligible services or to ineligible service providers. See Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board On Universal Service, CC Docket Nos. 97-21 and 96-45, Order, FCC 99-291 (1999) (“Commitment Adjustment Order”) and Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Federal-State Joint Board On Universal Service, 15 FCC Rcd. 22975, 22976 -77, ¶3 (2000) (“Commitment Adjustment Implementation Order”). **USAC has not alleged that the equipment and services provided to the schools by Connect2 were ineligible for discounts under the Act,** that Connect2 was not an eligible service provider under the Act, or that the schools’ failure to pay their non-discounted share violated the Act. See CALs, Exhibit 1.

Instead, SLD has claimed only that Connect2’s failure to collect from the schools the full amount of the non-discounted share of the costs of the equipment and services is a “violation of the rules of this schools and libraries support mechanism.” See CALs at 5. SLD provided no citation to any FCC rule in support of that proposition.<sup>10</sup> However, in August 2004, the Commission indicated that the schools’ failure to pay was not a violation of the rules in existence at the time the CALs and RODLs were issued: “our rules do not set forth a specific timeframe for determining when a beneficiary [school] has failed to pay its non-discounted share.” Schools and Libraries Fifth R&O, at ¶24. In that decision, the Commission stated for the first time that “allowing schools and libraries to delay for an extended time their payment for services would subvert our rule that the beneficiary must pay, at a minimum ten percent of the

---

<sup>10</sup> The CALs also state that “FCC rules require the applicant to pay its service provider the full cost of the non-discounted portion owed to the service providers from funds budgeted within the funding year,” but provide no citation to any specific provision of the Commission rules. See CALs at 5.

cost of the supported services” and decided “prospectively that a failure to pay more than 90 days after completion of service...presumptively violates our rule that the beneficiary must pay its share.” *Id.* (emphasis added).<sup>11</sup> Thus, at the time the CALs and RODLs were sent to Mr. Angelides, the schools could have paid the non-discounted portion without violating any rule and the fact that they had not yet done so at that time apparently did not violate any rule.

Moreover, at the time that the CALs and RODLs were issued, SLD was not authorized by the Commission to seek recovery of funds disbursed in violation of “the rules of **this schools and libraries support mechanism,**” **rather than in violation of the statute.**<sup>12</sup> **In December 2003, on the same day that the Angelides Debarment Notice was issued, the Commission acknowledged that:**

While the *Commitment Adjustment Implementation Order* implemented procedures, consistent with the Commission’s debt collection rules, for recovery of funds that were disbursed in violation *statutory* requirements, **the Commission has not comprehensively addressed the question of what recovery procedures would be appropriate in situations where it is determined that funds have been disbursed in violation of particular programmatic rules that do not implicate statutory requirements.**

See *Schools and Libraries Third R&O* at ¶79 (italics in original; other emphasis added). In August 2004 -- eight months after Mr. Angelides had been debarred and more than two years after the plea agreement in the criminal proceedings -- the Commission finally addressed that issue and provided notice for the first time of its recovery plans with respect to programmatic rule violations:

---

<sup>11</sup> Although the Commission referred to “our rule that the beneficiary must pay its share,” it cited no specific rule provision containing that requirement.

<sup>12</sup> The Commission has stated that USAC’s role is “exclusively administrative” and that it is to apply only “existing decisional principles.” Specifically, USAC “may not make policy, interpret unclear provisions of the statute or rules or create the equivalent of new guidelines, or interpret the intent of Congress. Where the Act or the Commission’s rules are unclear, or do not address a particular situation, USAC must seek guidance from the Commission on how to proceed.” See *Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Third Report and Order*, 13 FCC Rcd. 25058 (1998) at ¶16.

*It is clear that funds disbursed in violation of the statute or rule that implements the statute or a substantive program goal must be recovered. In this order we identify rules of this type and provide advance notice to all stakeholders that violation of these rules will result in recovery.*

Schools and Libraries Fifth R&O at ¶18 (emphasis added).

In short, after participating in the criminal prosecution resulting in the plea agreement and imposition of a \$290,000 civil forfeiture, USAC now seeks to recover additional funds from Connect2 based on the same conduct at issue in the criminal proceedings, by applying administrative rules and procedures that did not exist until two years after the plea agreement was accepted and did not exist when the CALs and RODs were sent to Mr. Angelides.

IV. The Amounts Involved In Certain USAC Demands Are De Minimis In Any Event.

The Commission has concluded that “it does not serve the public interest to seek to recover funds associated with statutory or rule violations when the administrative costs of seeking such recovery outweigh the dollars subject to recovery.” Schools and Libraries Fifth R&O at ¶35. With respect to certain of the funding requests at issue here, the amounts at issue are de minimis and the administrative costs of pursuing to their ultimate conclusion the recovery efforts on those funding requests will exceed the amount at issue. See, e.g. Christ Crusader Academy (\$13,608.00); Clara Muhammad School, Funding Request No. 402791 (\$20,412); D&G Koloides Parochial School (\$8,008.76); Lutheran School of Flushing (\$6,440.39); Martin Luther High School (\$9,072.00); School of the Transfiguration, Funding Request No. 406185 (\$20,412); and St. John Lutheran School (\$13,608.00). The Commission has directed USAC “not to seek recovery of such de minimis amounts” under these circumstances and it should exercise its discretion to terminate collection activity with respect to these matter. See Schools and Libraries Fifth R&O at ¶35.

V. Demanding Full Recovery From Connect2 Is Arbitrary and Capricious.

The CALs and RODLs seek recovery from Connect2 of amounts totaling nearly \$1.7 million, based exclusively on the schools' failure to pay their non-discounted portion of the cost of the equipment and services installed by Connect2. None of the CALs at issue here contend that the funds sought to be recovered from Connect2 were not used to provide eligible equipment and services to the schools. Rather, USAC is demanding repayment from Connect2 of funds that actually were used to acquire and install the equipment and services at the schools, **solely because the schools failed to pay their non-discounted share (which amounts to a small fraction of the funds that USAC is demanding from Connect2). USAC's demands are excessive,** inequitable and ultimately contrary to the overall objective of the statute.

A. The Schools Have Received The Benefits Of The Disbursed Funds.

The Commission contends that it is required by statute and applicable Supreme Court precedent to recover all funds disbursed by USAC in violation of Section 254 of the Communications Act. See, e.g., Commitment Adjustment Order at ¶7; Schools and Libraries Fourth R&O at ¶¶3-5. Even assuming that the statutes and precedents cited by the Commission apply to the Universal Service Fund, which is collected, maintained and disbursed by USAC and is not intermingled with general Treasury funds, the recovery demands at issue here are based on alleged violations of "the rules of this schools and libraries support mechanism," not violations of the statute. See CALs, Exhibit 1. Although the schools apparently did not pay in full their respective shares of the cost of the equipment and services installed by Connect2, there is no claim that the funds disbursed were not used by Connect2 in a manner consistent with the statute -- i.e. to provide "services to elementary schools, secondary schools and libraries for educational purposes at rates less than the amounts charged for similar services to other parties." See 47

U.S.C. §254(h)(1)(B). The authorities cited by the Commission as the basis for its recovery obligations do not require recovery from the service provider of all disbursed amounts that actually were used to provide eligible equipment and services to the school solely because the school did not pay the full amount of its non-discounted share.

B. Demanding Recovery Exclusively From Connect2 Is Inequitable.

Even the Commission has recognized that it is inequitable to demand full recovery exclusively from the service provider of funds used to provide equipment and services **to the schools in cases where the schools have failed to pay their non-discounted shares. In the Schools and Libraries Fourth R&O, the Commission reconsidered its earlier determination to** seek recovery of funds exclusively from the service provider:

[W]e conclude that recovery actions should be directed to the party or parties that committed the rule or statutory violation in question. We do so recognizing that in many instances this will likely be the school or library, rather than the service provider. ...We are now convinced that it is both unrealistic and inequitable to seek recovery solely from the service provider.

Schools and Libraries Fourth R&O at ¶¶10, 12. The Commission also stated that “the school or library is likely to be the entity that commits an act or omission that violates...the obligation to pay the appropriate non-discounted share” of the cost of equipment and services installed at the school by the service provider. Id. at ¶15. Nevertheless, the recovery demands set forth in the CALs and RODLs at issue here seek recovery from Connect2 of nearly \$1.7 million in disbursed funds used to provide equipment and services to the schools, based solely on the schools’ failure to pay the non-discounted share.

C. USAC’s Recovery Demands Are Excessive and Ultimately Inconsistent With The Objectives of Statute.

Connect2 and Mr. Angelides already have paid a high price for their misconduct in the Schools and Libraries Program. Connect2 is essentially out of business. Mr. Angelides, a

67 year old man who had no prior record of criminal activity and had been well respected in his community, has pleaded guilty to felony charges, been assessed a substantial civil forfeiture, been debarred from the Schools and Libraries Program and been diagnosed with inoperable lung cancer that has metastasized to his brain. The collection efforts currently being undertaken by USAC constitute administrative overkill and threaten to eliminate whatever good has come from the Program at these schools.

In some cases, USAC is seeking to recover from Connect2 nearly ten times the **amount that the schools failed to pay. For example, USAC is seeking recovery from Connect2 of nearly \$300,000 with respect to Clara Muhammad School based on the school's failure to pay its** non-discounted share of \$33,300. The funds that USAC seeks to recover from Connect2 were used to provide equipment and services to the schools; Connect2 does not have those funds to repay to USAC. Although the Commission recently determined that USAC may seek to recover funds from the school or library as well (see Schools and Libraries Fourth R&O), the CALs and RODLs at issue here relate to small private schools that are unlikely to have the financial resources to meet demands for recovery of all of the funds disbursed for equipment and services, regardless of whether those demands are made directly by USAC or indirectly by Connect2. Thus, to the extent that USAC seeks to protect the integrity of the program by attempting to recover funds that actually were used to install equipment and services at the school, but were purportedly "disbursed in error" because the school failed to pay its non-discounted share, its collection efforts will instead undermine the goals of the program because the "proceeds" of the *erroneously disbursed funds exist only in the form of the equipment at the school, and recovery* of those proceeds will serve only to deprive the school of continued use of the equipment and services for educational purposes.




Conclusion

For the reasons set forth above, Connect2 respectfully requests the Commission to grant review of the USAC Decision, to waive the requirements of Section 54.720 of the rules if such waiver is necessary to consider the merits of its appeal, and to terminate collection activity with respect to the above-referenced funding requests. In the event that the Commission decides to pursue the recovery demands at issue here, Connect2 respectfully requests the opportunity for hearing.

**Date: December 27, 2004**

**Respectfully submitted,**

CARTER LEDYARD & MILBURN LLP

By:   
Timothy J. Fitzgibbon, Esquire  
Jennifer M. Wagman, Esquire  
CARTER LEDYARD & MILBURN LLP  
1401 Eye Street, N.W., Suite 300  
Washington, D.C. 20005  
Telephone: (202) 898-1515  
Facsimile: (202) 898-1521

*Counsel for Connect2  
Internet Networks, Inc.*